Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

N.B., by her Mother and Next Friend, D.G.,

Petitioner,

vs.

ALACHUA COUNTY SCHOOL BOARD, and ROBERT HUGHES, Superintendent, Alachua County School Board, Individually and in his official capacity; SUWANNEE COUNTY SCHOOL BOARD, and CHARLES F. BLALOCK, JR., Superintendent, Suwannee County School Board, Individually and in his official capacity; COLUMBIA COUNTY SCHOOL BOARD, and DIANE LANE, Superintendent, Columbia County School Board, Individually and in her official capacity,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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20 pp

QUESTIONS PRESENTED

I. Is the doctrine of exhaustion of administrative remedies applicable when Plaintiff's had no administrative remedy for their claim for money damages for violation of the Individuals With Disabilities Education Act?

II. Is the doctrine of exhaustion of administrative remedies applicable when there is no final administrative decision because the State of Florida closed Plaintiffs' administrative complaint file when Plaintiffs moved to Georgia?

III. Is the doctrine of exhaustion of administrative remedies even applicable to Plaintiffs' cause of action pursuant to 42 U.S.C. §1983?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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No.

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N.B., by her Mother and Next Friend, D.G.,

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ALACHUA COUNTY SCHOOL BOARD, and ROBERT HUGHES, Superintendent, Alachua County School Board, Individually and in his official capacity; SUWANNEE COUNTY SCHOOL BOARD, and CHARLES F. BLALOCK, JR., Superintendent, Suwannee County School Board, Individually and in his official capacity; COLUMBIA COUNTY SCHOOL BOARD, and DIANE LANE, Superintendent, Columbia County School Board, Individually and in her official capacity,

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, N.B., by her Mother and Next Friend, D.G., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 84F.3d 1367 and is reproduced in the Appendix filed herewith. The unreported opinion of the district court in this case is the appendix to the Eleventh Circuit decision.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on June 7, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY & REGULATORY LAW INVOLVED

This case is governed by the "Individuals With Disabilities Education Act" (I.D.E.A) 20 U.S.C. §1400 et. seq. The stated purpose of the act is:

> "to assure that all handicapped children have available to them, within the time period specified in §1412(2)(B) of this title, a free appropriate public education, which emphasizes special education and related services designed to meet their unique needs, to assure that the right of handicap children and their parents or guardians are protected, to assist states and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicap children." 20 U.S.C. §1400(c).

34 C.F.R. §300.552, entitled "Placements" was promulgated pursuant to the I.D.E.A., it states:

> "Each public agency shall insured that: (a) Each handicapped child's education placement: (1) Is determined at least annually, (2) Is based on his or her individualized education program, and (3) Is as close as possible to the child's home: (b) The various alternative placements included under §300.551 are available to the extent necessary to implement the individualized education program for each handicapped child; (c) Unless a handicapped child's individualized education program requires some other

arrangement, the child is educated in the school which he or she would attend if not handicapped; and (d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs."

STATEMENT OF THE CASE

N.B. was born on May 22, 1982. She has been hearing impaired since birth. She has no other handicap. As a hearing impaired person, she is entitled to a free and appropriate public education, pursuant to the Individuals with Disabilities Act (I.D.E.A.) 20 U.S.C. §1400 et. seq., hereinafter I.D.E.A. At all times relevant to this action, N.B. lived in either Columbia County or Suwannee County, Florida. Therefore, at all times relevant to this action, either the Suwannee County School Board or the Columbia County School Board was responsible for providing N.B. with a free and appropriate public education. At all times relevant to this action, either Defendant, SUWANNEE COUNTY SCHOOL BOARD or COLUMBIA COUNTY SCHOOL BOARD failed to provide N.B. with a free and appropriate public education either at her neighborhood school or at a school within her county of residence. Instead, they conspired with Defendant, ALACHUA COUNTY SCHOOL BOARD, to deprive N.B. of a free and appropriate public education: by segregating her from hearing students; and, by requiring her to ride a school bus from either 50 miles from Columbia or 80 miles from Suwannee counties to Alachua County on a daily basis. As a result of Defendants' actions, N.B., as an elementary school student, rode a school bus five to six hours per day to and from school. In addition to the interminable bus ride, N.B. missed a significant portion of each and every school day because the school bus was scheduled to both arrive late and leave early each day. This situation continued until the minor child moved to Georgia in August, 1993 at which time, despite a superior I.Q., N.B. was academically functioning several years below grade level.

On June 15, 1993 Plaintiffs' filed pro se administrative complaint against the Suwannee and Alachua County School Boards. On September 2, 1993 that claim was abated by the Florida Department of Education until such time as Plaintiffs' returned to Florida, if ever. On December 27, 1994, Plaintiffs filed an action for money damages against

the named Defendants. Plaintiffs evoked the court jurisdiction pursuant to 28 U.S.C. 1332(a)(1) and 28 U.S.C. §1343. Prior to service on the Defendants, Plaintiff amended her complaint on February 27, 1995.

On April 2, 1995, Defendants, SUWANNEE COUNTY SCHOOL BOARD and CHARLES F. BLALOCK, JR., filed an answer to the Amended Complaint. These Defendants did not present any defense in law or fact, by counter-claim, cross-claim, or third party claim, nor did they assert any of the Rule 12(b) defenses.

On June 9, 1995, Defendants, ALACHUA COUNTY SCHOOL BOARD, COLUMBIA COUNTY SCHOOL BOARD, ROBERT HUGHES and DIANE LANE filed a Motion to Dismiss Plaintiff's First Amended Complaint. The Motion to Dismiss set forth four grounds for dismissal:

1. Failure to exhaust administrative remedies;
2. The Statute of Limitations;
3. Failure to state a claim for which relief could be granted with regard to Count I; and,
4. Failure to state a claim for which relief could be granted with regard to Count II.

On July 21, 1995, the Honorable Maurice M. Paul, Chief Judge of the United States District Court for the Northern District of Florida entered an Order granting the Motion to Dismiss with Prejudice. In so doing, Judge Paul rejected Plaintiff's position:

1. That since she no longer resided within any one of the three school districts in question, there was no administrative remedy available, and

2. That because she is seeking money damages, the Defendants lack authority to grant the relief requested and so exhaustion would be futile.

In their Motion for Rehearing, which was denied by Judge Paul, Plaintiffs raised the issue of the abated administrative complaint.

On appeal, the United States Court of Appeals for the Eleventh

Circuit affirmed and adopted District Judge Paul's Memorandum Order.

REASONS FOR GRANTING THE WRIT

This court should grant the writ of certiorari in order to resolve a split between the Federal Circuit Courts of Appeal two important questions concerning the applicability of the doctrine of exhaustion of administrative remedies. The first issue presents a conflict in cases where Plaintiffs are alleging a cause of action for money damages for violation of a Federal right under the I.D.E.A. Such actions were approved by this court in *Franklin v. Guinett County Public Schools*, 503 U.S. 60, 112 S.Ct. 1028, 117 L.Ed. 2d 208 (1992) wherein it was held that unless there was specific statutory language to the contrary there is always a right to damages for violation of a Federal right. The decision of the Circuit Court of Appeals for the Eleventh Circuit subverts that right by grafting onto it the requirement of compliance with the doctrine of exhaustion of administrative remedies. This decision conflicts with the Ninth Circuit's decision in *Hoeft v. Tucson Unified School District*, 967 F.2d 1298 (9th Cir. 1992) which held there can't be a blanket application of the doctrine and instead there must be an analysis of whether pursuit of administrative remedies under the facts of the given case will further the general purpose of exhaustion and the congressional intent behind the administrative scheme. In cases such as Plaintiffs where the Defendants school districts have overtly interfered with a child's right to a free and appropriate public education, the expertise of the school district is simply not an issue.

This case presents a second issue of the conflict between the decision of the Eleventh Circuit with regard to requiring Plaintiffs to exhaust their administrative remedies before pursuing their claim for damages pursuant to 42 U.S.C. §1983 and the decision of the Third Circuit in *W.B. v. Matula*, 67 F.3d 484 (3rd Cir. 1995) which held the doctrine was inapplicable.

Without a definitive ruling by this court with regard to the applicability of the doctrine of exhaustion of administrative remedies the actions or money damages under both the I.D.E.A. and 42 U.S.C. 1983 the various circuits will continue to reach divergent answers to these questions. As a result, there will be an uneven application of the law depending on what area of the United States a particular citizen resides

in.

Although the position of the Eleventh Circuit did not act within an absolute bar to the citizen's right to bring this action, it does have an extra and unnecessary layer of litigation with concommittent expenditure of cost and time, effort and energy. The decision of the Eleventh Circuit only serves to further insulate the local school board from responsibility for their actions.

I.

Is the doctrine of exhaustion of administrative remedies applicable when Plaintiff's had no administrative remedy for their claim for money damages for violation of the Individuals With Disabilities Education Act?

Judge Paul held that Plaintiffs have failed to exhaust their administrative remedies available to them under the I.D.E.A. and that this failure to exhaust precludes both Plaintiffs' I.D.E.A. and §1983 claims. Therefore, the essential question is whether Plaintiffs were required to exhaust their administrative remedies under the I.D.E.A. even though damages are not available to Plaintiffs in the administrative process.

This court pointed out in *Honig v. Doe*, 484 U.S. 305, 98 L.Ed. 2d 686, 108 S.Ct. 592 (1988), the necessity of the I.D.E.A. and its predecessor Acts and noted that Congress sought "to assure that all handicapped children have available to them. . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, [and] to assure that the rights of handicapped children and their parents or guardians are protected."

Plaintiffs' concede that in most cases the I.D.E.A. requires exhaustion. However, there are exceptions to the exhaustion requirement. Specifically, parents need not avail themselves of the administrative process when: such a process would be inadequate or futile; the grievance challenges generally applicable school board policies that are contrary to recognized law; or, exhaustion will work severe harm upon the litigant. See, for example, *Learning Disabilities*

Association v. Board of Education, 837 F. Supp. 717, 722-23 (D. Md. 1993). As noted in Learning, the determination of whether one of these "narrow" exceptions is applicable depends upon "'whether the pursuit of administrative remedies under the facts of a given case will further the general purposes of exhaustion and the congressional intent behind the administrative scheme.'" *Learning*, 837 F. Supp. at 723 (quoting *Hoeft v. Tucson Unified School District*, 967 F.2d 1298, 1302-03 (9th Cir. 1992)).

In this case, Plaintiffs were seeking money damages pursuant to this court's holding in *Franklin v. Guinett County Public Schools*, 503 U.S. 60 (1992) for Defendants' violation of N.B.'s Federal rights. This implied remedy is simply not available administratively, i.e., the Agency is not "empowered to grant effective relief" and exhaustion is not required. *McCarty v. Madigan*, 503 U.S. 140; (1992)

II.

Is the doctrine of exhaustion of administrative remedies applicable when there is no final administrative decision because the State of Florida closed Plaintiffs' administrative complaint file when Plaintiffs moved to Georgia?

The doctrine of exhaustion of administrative remedies is simply not applicable under the facts of this case wherein Plaintiffs' administrative complaint was abated pending their possible return to Florida at some date in the future. Like Hero's paradox wherein the arrow never reaches the target; Plaintiffs' cause of action would never accrue since the administrative action is still pending.

III.

Is the doctrine of exhaustion of administrative remedies even applicable to Plaintiffs' cause of action pursuant to 42 U.S.C. §1983?

20 U.S.C. §1415(f) provides:

"Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes protecting the rights of children and youth with

> disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter."

The applicability of exhaustion to §1983 cases arising out of violation of the I.D.E.A. was favorably answered by the 3rd Circuit in *W.B. v. Matula*, 67 F.3d 484 (3rd Cir. 1995). In *Matula*, a disabled student's mother sought damages for Defendants "persistent refusal . . . to evaluate, classify and provide necessary educational services" to her son. Plaintiffs filed suit pursuant to the I.D.E.A. and §1983. After determining plaintiffs could recover damages on their I.D.E.A. based §1983 claim, but not under the I.D.E.A. itself, the Court found exhaustion unnecessary via the following rationale: The I.D.E.A. requires that "before the filing of a civil action . . . seeking relief that is also available under this subchapter," a plaintiff must exhaust the I.D.E.A. procedures. 20 U.S.C. §1415(f). Where recourse to an I.D.E.A. administrative proceedings would be futile or inadequate, however, the exhaustion requirement is excused. (Citations omitted)

In the case at bar, it would be futile, if not impossible, for plaintiffs to exhaust their administrative remedies because the relief sought by plaintiffs in this action is unavailable in I.D.E.A. administrative proceedings.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED JUNE 7, 1996

No. 95-3214, Non-Argument Calendar

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

84 F.3d 1376

June 7, 1996, Decided

N.B. , by her mother and next friend, D.G. a/k/a N.B. , Plaintiff-Appellant, v. ALACHUA COUNTY SCHOOL BOARD, RobertW. Hughes, Superintendent, Alachua County School Board, individually and in his official capacity, Suwannee County School Board, Charles F. Blalock, Jr., Superintendent, Suwannee County School Board, individually and in his official capacity, Columbia County School Board, Diane Lane, Superintendent, Columbia County School Board, individually and in her official capacity, Defendants-Appellees.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Florida. (No. 94-10164-MMP). Maurice Mitchell Paul,Chief Judge.

84 F.3d 1376

DISPOSITION: AFFIRMED.

COUNSEL: ATTORNEY(S) FOR APPELLANT(S): N. Albert Bacharach, Jr., Gainesville, FL.

ATTORNEY(S) FOR APPELLEE(S): Francis H. Sheppard, Esq.,

FRANCIS H. SHEPPARD,
P.A., Orlando, FL.

ATTORNEY(S) FOR APPELLEE(S): (FOR SUWANNEE COUNTY SCHOOL BOARD & CHARLES F. BLALOCK, JR.): John M. Cacciatore, UNGER, CACCIATORE & SWARTWOOD, P.A., Orlando, FL, Gregory David Swartwoodk, -do-.

JUDGES: Before TJOFLAT, Chief Judge, and DUBINA and BLACK, Circuit Judges.

OPINION: PER CURIAM

We affirm the judgment of the district court for the reasons stated in the district court's dispositive order of July 20, 1995, which appears in the Appendix.

AFFIRMED.

APPENDIX

ORDER

This cause comes before the Court upon motion to dismiss plaintiff's first amended complaint by defendants Alachua County School Board and Columbia County School Board (doc. 6). For the reasons stated below, the motion is GRANTED.

BACKGROUND

Plaintiff N.B. is a hearing impaired child. During the relevant time periods, N.B. lived in either Columbia or Suwannee County, Florida. Sometime prior to March 1986, N.B. was bused from her home in Columbia or Suwannee County to attend a special school for hearing impaired children in Alachua County. Plaintiff claims that this decision caused her to be segregated from hearing students. She also claims that the long bus ride caused her to miss a significant portion of class work each school day. N.B. left the State of Florida at the end of the 1992/93 school year and is no longer in the Florida educational system.

N.B. has brought this suit alleging violations of the Individuals with Disabilities in Education Act ("IDEA"), 20 U.S.C. @ 1400 et seq. She seeks compensatory damages under the IDEA (Count I) and 42 U.S.C. @ 1983

(Count II).

In the motion to dismiss, defendants move for dismissal of the first amended complaint based on the following four grounds: 1) the plaintiff has failed to exhaust administrative remedies; 2) the plaintiff's claims are barred by the statute of limitations; 3) compensatory damages are not available under the IDEA; and 4) compensatory damages are not available under 42 U.S.C. @ 1983 for violations of the IDEA. Because the Court finds dismissal is appropriate for plaintiff's failure to exhaust necessary administrative remedies as a prerequisite to filing this action, the Court need not reach the remaining three issues concerning the statute of limitations and the availability of compensatory damages under the IDEA and 42 U.S.C. @ 1983.

DISCUSSION

The IDEA, formerly known as the Education for All Handicapped Act ("EHA"), 20 U.S.C. @ 1400 et seq., provides federal money to state and local education agencies in order to assist them in educating handicapped children, on the condition that the states and local agencies implement the substantive and procedural requirements of the Act. The principal purpose of the
Act is "to assure that all children with disabilities have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet the handicapped child's unique needs, ... [and to ensure] that the rights of handicapped children and their parents or guardians are protected." 20 U.S.C. @ 1400(c).

To carry out these objectives, the IDEA provides procedural safeguards to permit parental involvement in all matters concerning the child's educational program and allows parents to obtain administrative and judicial review of decisions they deem unsatisfactory or inappropriate. Honig v. Doe, 484 U.S. 305, 311-12, 108 S. Ct. 592, 597-98, 98 L. Ed. 2d 686 (1988). Under this scheme of procedural protections, parents are entitled to 1) examination of all relevant records pertaining to evaluation and educational placement of their child, 2) prior written notice whenever the responsible educational agency proposes, or

refuses, to change the child's placement, 3) an opportunity to present complaints concerning any aspect of the local agency's provision of a free appropriate public education, and 4) an opportunity for an "impartial due process hearing" with respect to any such complaints. Id. at 312, 108 S. Ct. at 598.

In the event that a party is dissatisfied with or aggrieved by the findings and decisions made after the impartial due process hearing, that party may obtain additional administrative review by the state educational agency. 20 U.S.C. @ 1415(c). If that party is still dissatisfied or remains aggrieved after the administrative appeal, a judicial review is available in either state court or federal court to contest the decisions of the educational agency. Id. @ 1415(e)(2).

"The philosophy of the [IDEA] is that plaintiffs are required to utilize the elaborate administrative scheme established by the [IDEA] before resorting to the courts to challenge the actions of the local school authorities."Ass'n for Retarded Citizens of Alabama v. Teague, 830 F.2d 158, 160 (11th Cir.1987) (citing Smith v. Robinson, 468 U.S. 992, 104 S. Ct. 3457, 82 L. Ed. 2d 746 (1984)). Key reasons for requiring the exhaustion of administrative remedies are as follows: 1) to permit the exercise of agency discretion and expertise on issues requiring these characteristics; 2) to allow the full development of technical issues and a factual record prior to court review; 3) to prevent deliberate disregard and circumvention of agency procedures established by Congress; and 4) to avoid unnecessary judicial decisions by giving the agency the first opportunity to correct any error. Id. The exhaustion requirement, however, is not jurisdictional and therefore ""is not to be applied inflexibly.' " Id. (quoting McGee v. United States, 402 U.S. 479, 483, 91 S. Ct. 1565, 1568, 29 L. Ed. 2d 47 (1971)). The exhaustion of the administrative remedies is not required where resort to administrative remedies would be 1) futile or 2) inadequate. Id. (citing to Smith v. Robinson, 468 U.S. at 1014 n. 17, 1019 n. 22, 104 S. Ct. at 3469 n. 17, 3472 n. 22).

In the amended complaint, plaintiff does not allege that she has exhausted her administrative remedies. Instead, plaintiff argues that exhaustion of administrative remedies is not required in this case because she no longer attends any of the defendant school districts. This argument was squarely rejected in Torrie By and Through Torrie v. Cwayna, 841 F. Supp. 1434 (W.D.Mich. 1994). In that case, an emotionally impaired student and his mother brought an action against a

school district and its employees for alleged violations of IDEA, Rehabilitation Act, false arrest and false imprisonment. The student and his mother neither requested an impartial due process hearing nor filed a complaint with the school district before filing the action. In responding to the school district's motion to dismiss based on failure to exhaust administrative remedies, the plaintiffs argued that exhaustion was not required under the futility exception because they no longer lived in the defendant school district. Reasoning that parents' unilateral act of removing their child from a public school could not excuse their failure to exhaust administrative remedies, the court dismissed the action for failure to exhaust remedies. Torrie, 841 F. Supp. at 1442. The rationale of Torrie is persuasive. If parents can bypass the exhaustion requirement of the IDEA by merely moving their child out of the defendant school district, the whole administrative scheme established by the IDEA would be rendered nugatory. Permitting parents to avoid the requirements of the IDEA through such a "back door" would not be consistent with the legislative intent of the IDEA.

The plaintiff's second argument is equally unpersuasive. The plaintiff argues there is no point pursuing administrative remedies because the defendant school districts lack authority to grant the relief requested, namely money damages. Again, if the plaintiff's argument is to be accepted, then future litigants could avoid the exhaustion requirement simply by asking for relief that administrative authorities could not grant. This goes against the very reason that we have the exhaustion requirement, which is "[to prevent] deliberate disregard and circumvention of agency procedures established by Congress."Teague, 830 F.2d at 160. In fact, courts that considered this argument have all rejected it. SeeBuffolino v. Board of Education of Sachem Central School District, 729 F. Supp. 240, 247 (E.D.N.Y. 1990); Waterman v. Marquette-Alger Intermediate School District, 739 F. Supp. 361, 368 (W.D.Mich. 1990) ("A procedure that may result in any substantial relief is not futile"); Torrie, 841 F. Supp. at 1442. Nor does the fact that the plaintiff also seeks money damages under 42 U.S.C. @ 1983 for violations of the IDEA make any difference. "When parents choose to file suit under another law that protects the rights of handicapped children--and the suit could have been filed under the [IDEA]--they are first required to exhaust the [IDEA]'s remedies to the same extent as if the suit had been filed originally under the [IDEA]'s provisions."Mrs. W. v. Tirozzi, 832 F.2d 748, 756 (2d Cir. 1987). As the plaintiff has failed to exhaust administrative remedies, the plaintiff may not proceed with her @ 1983 claims for violations of the IDEA.

CONCLUSION

Accordingly, the defendants' motion to dismiss is GRANTED. The Clerk is directed to dismiss the first amended complaint with prejudice.